No. 15857

United States
Court of Appeals
For the Ninth Circuit

KENNETH J. PHIPPS,

Appellant,

vs.

N. V. NEDERLANDSCHE AMERIKA-ANSCHE STOOMVART, MAATS,
a Corporation, also known as
HOLLAND-AMERICA LINE,

Appellee.

Brief of Appellant

Appeal from the United States District Court for the District of Oregon.

WILLIAM G. EAST, Judge

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STATEMENT OF JURISDICTION

This is an action at law based upon a complaint for personal injuries between a longshoreman and citizen of the State of Oregon and a foreign corporation existing under the laws of Holland (T. 1, 2, 15, 17 and R.T. 273) in which the appellant claims damages of more than $3,000.00 for a maritime tort against appellee corporation (T. 2, 17 and R.T. 273-4). The answer admits such diversity of citizenship and the jurisdictional

amount is involved in this case. (T. 12). A final judgment in favor of appellee and against appellant based upon the directed verdict of the jury was filed on September 27, 1957, and this appeal was thereafter seasonably perfected (T. 32-3) and bond for costs on appeal filed. (T. 35). It is contended that the United States District Court for the District of Oregon had jurisdiction of this action on the basis of the above facts under 28 U.S.C.A., Sections 1331, 1332, sub. 2, and 1333, sub. 1; and that the United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under 28 U.S.C.A., Sections 1291 and 1294.

(T. refers to Transcript of Record). (R.T. refers to Reporter's Transcript). (Blackface type where used are supplied by appellant.)

STATEMENT OF CASE

The admitted facts in this case as stipulated in the Pretrial Order (T. 15, 16, 17 and R.T. 273-4) show:

1. N. V. Nederlandsche Amerikaansche Stoomvart, Maats, a steamship operator, was and now is a corporation, organized and existing under and by virtue of the laws of Netherlands.

2. W. J. Jones & Sons, Inc., a stevedore company, was and now is a corporation, organized and existing under and by virtue of the laws of the State of Oregon.

3. The stevedore contract dated April 19, 1954, and

duly executed by W. J. Jones & Son, Inc., and Royal Mail Lines Limited and Holland-America Line, which is listed as a pretrial exhibit, was a stevedore contract agreed upon and existing between defendant and W. J. Jones & Son, Inc., and pursuant to said contract, W. J. Jones & Son, Inc., was engaged in loading the Motor Vessel Dalerdyk at the time and place of plaintiff's alleged accident.

4. On or about June 11, 1954, the plaintiff was working as a hold man in a longshore gang, all of whom are employed by the master stevedore, W. J. Jones & Son, Inc., who was loading the Motor Vessel Dalerdyk, said vessel being owned and operated by defendant; that at the time of said alleged accident, the vessel was lying at a dock known as Albina Dock, in the Port of Portland, Oregon.

5. On or about June 11, 1954, defendant was the employer of the master, officers and crew of said vessel and the master stevedore, W. J. Jones & Son, Inc., was the employer of all the longshoremen who were performing the work of loading and discharging said vessel.

6. Plaintiff elected to pursue a remedy against the defendant pursuant to the provisions of the Longshoremen's and Harbor Workers' Act of the United States, and has filed with the United States Department of

Labor, Bureau of Employees Compensation, a formal notice of election to sue.

7. Plaintiff was, and is, a resident and citizen of the State of Oregon, and the amount in controversy is in excess of $3,000.00, exclusive of interest and costs.

8. At all material times there was a Pacific Coast Marine Safety Code, which was agreed to and adopted under the provisions of the Pacific Coast Longshore Agreement, 1951-1953.

The evidence shows that appellant was a longshoreman working as a hold man in a longshore gang assisting in loading and stowing certain heavy dimensioned timber cargo, each piece of such timber being approximately 3" x 6" in size and random lengths up to approximately 35' long, with 18 or 20 pieces to one sling load, and appellant was working at and near the bottom of No. 3 hatch of such vessel and about six feet away from and underneath the hatch coaming. Such hatch was approximately 35 to 40 feet in depth and 20 feet square and lined with a steel lining from top to bottom and did not have any guard rail or railing around the top of such hatch on the deck. (R.T. 25, 26, 159-172 inclusive, 191-198 inclusive).

The evidence further shows that in connection with such cargo loading operation, such timber cargo was lowered into and down such hatch by sling loads se-

cured by a single cable sling and lowered by electric power-driven winches, and because of the small construction of such hatch and hold area, such sling loads of heavy timbers had to be lowered down such hatch nearly end first. (R.T. 37, 38, 88-98 inclusive, 104, 173-180 inclusive, 194).

The evidence further shows that when appellant was so working in the bottom of such hatch and while a large sling load of approximately 20 pieces of such random length timbers were being lowered over and down said hatch near the top thereof, suddenly and without worning one large heavy 3"x 6" timber approximately 35' long slipped out of such sling load and fell end first down into said hatch and down and upon the left leg and foot of appellant and appellant then and there received the grave and serious injuries hereinafter mentioned. (R.T. 26, 27, 31, 32, 37, 38, 80, 81-99 inclusive, 104, 105, 167, 168, 193-205 inclusive).

The witness, Charles Edward Hodges, who was the superintendent in charge and agent of appellee in Portland, Oregon, and who testified as one of its witnesses, testified on cross examination that he was present on board such vessel several times on the day of the accident involved in this case (R.T. 248), and that he was in charge of all business for this ship for appellee, and that he or his supercargo gave instructions to the stevedore company where to place the various kinds of cargo

being loaded upon such vessel, including these large timbers. (R.T. 228, 250). Mr. Hodges further testified on cross examination that there were two large hatches on this ship, number 2 and number 5, each of them being approximately 36 feet long and 20 feet wide, in which such sling loads of heavy dimensioned timbers could have been loaded flat or cross ways, with two slings attached to each sling load, so that it would be impossible to have a slider fall out of any such sling load while such cargo was being loaded into the large hatch. (R.T. 239, 240). The evidence, through appellee's vessel loading record, also shows that some of this large dimensioned decking timber was so loaded into both of these larger hatches. (Exhibit 6).

Dr. Howard L. Cherry testified about the serious and permanent injuries appellant received as a result of this heavy stick of timber smashing and crushing his left foot, which included amputation of the great toe and the toe next to it. (R.T. 126-153 inclusive). Dr. Cherry also explained the color slide pictures taken by Dr. Rowland, appellant's exhibits 4-D through 4-J. (R.T. 136-144 inclusive). Appellant's hospital records (Exhibit 5) are very extensive and show his long period of hospitalization.

Dr. Willard D. Rowland, a surgeon who specializes in plastic and reconstructive surgery, also testified as to the serious and permanent injuries appellant re-

ceived as a result of this accident. (R.T. 45-71 inclusive). Dr. Rowland also testified about the nature of the several operations that he performed upon appellant, and that he took seven color slide pictures to show the progress of the injury and the operative procedure. These slides were received in evidence as appellant's exhibits 4-D through 4-J. (R.T. 136-144 inclusive, and 152).

It was stipulated and agreed between the attorneys for appellant and appellee at the trial of this case that the total amount of hospital and medical expenses incurred by the appellant in connection with his injuries received in such accident amounted to the sum of $7,120.00. (R.T. 155, 156).

The evidence also showed that the appellant was earning the sum of $22.05 per day as a longshoreman at the time of his accident on June 11, 1954, and that he had not been able to work in his employment as a longshoreman at any time since said date as a result of the injuries received in the accident. (R.T. 187-191 inclusive). This would make a total of approximately $15,000.00 that appellant has lost in wages up to the time of the trial of this case in September, 1957.

The evidence also showed that at the time of the accident appellant was a strong able-bodied man, 40 years of age, with a life expectancy of 28 years. Mr. Phipps also testified that he was a member of the

United States Marines in World War II (R.T. 183, 186, 187, 276).

The specifications of negligence and unseaworthiness charged against appellee by appellant are as follows:

(a) Defendant-appellee failed to provide sufficient, adequate and safe ship's gear and equipment and a safe working place for all stevedoring operations on board said ship, including more particularly, the operation whereby appellant was injured; ;

(b) Defendant-appellee failed to see that all working conditions were safe;

(c) Defendant-appellee failed to see that said operation was carried on in a safe manner;

(d) Defendant-appellee failed to stop said work and operation in order to avoid an accident and injury to appellant;

(e) In that the master, owners or agents of the said steamship and defendant-appellee improperly directed this appellant to work in an unreasonable, defective and dangerous place in that he was working in a small cramped area, where he was exposed to extreme danger of being struck by the fall of such large heavy timber, which did fall as herein described;

(f) That said vessel was unseaworthy by reason of the

way said hatch and surrounding hold area were constructed and used for such lumber loading operation in that such hatch and hold area were too small and too dangerous and unsafe for loading and stowing such large sling loads of long heavy pieces of timber by the aforesaid method;

(g) Defendant-appellee improperly used said Number three hatch by causing and directing said large loads of long pieces of heavy lumber cargo to be loaded into and stowed in said hatch by the aforesaid method, when defendant-appellee knew or should have known by the exercise of reasonable care that such operation was extremely dangerous and liable to result in injuries to longshoremen, including appellant, working said hatch, and when said vessel then had one or two other larger hatches which were available, and which could have been used to load and stow such large loads of said lumber and could have been lowered and loaded crossways, and thereby make it a reasonably safe operation and avoid injuring appellant. (T. 3, 4, 5, 6, 7, 8, 19, 20, 21).

After both sides had produced all their witnesses and the testimony was all in, both sides then rested. The appellee then moved the court for a directed verdict in its favor for the reason that appellant had failed to present evidence sufficient to go to the jury that there

was negligence or unseaworthiness of the vessel that proximately caused appellant's injuries. (R.T. 283).

The court thereupon allowed such motion for a directed verdict and ordered the jury to return a verdict in favor of the appellee, which was then done, and a judgment thereon was filed on September 7, 1957. (R.T. 304-312 inclusive). Thereupon this appeal was perfected from said judgment.

The appellant contends that the trial court erred in directing such verdict; and further, that the evidence affirmatively shows that it is a jury question that said accident was caused without any contributory fault or negligence on the part of the appellant and solely and proximately by the defective, unsafe and unseaworthy condition of said vessel by the failure of appellee to provide proper and sufficient ways, works, means and appliances on said vessel, and by the fault and negligence of the appellee acting by and through its agents and the master and crew of said steamship in certain particulars, which are set out in detail in this statement and in Specifications of Error Numbers 1 through 5 in this brief.

Appellant further contends that the trial court erred in rejecting or refusing to admit certain evidence, as set out in Specifications of Error Numbers 6, 7 and 8 herein.

SPECIFICATION OF ERROR NUMBER ONE

The trial court erred as a matter of law in allowing and directing a verdict for said appellee, which was objected to by appellant, and having judgment entered thereon and against appellant, for the reason that such verdict and judgment is against and contrary to the evidence and the law involved in this case.

ARGUMENT

As outlined in the statement of this case in this brief, the evidence shows that the appellant longshoreman was engaged in his work assisting other longshoremen in stowing 3 x 6 heavy rough timbers of random lengths up to 35 or 40 feet long at the bottom of No. 3 hatch when he was hit on his left foot by a slider that fell to the bottom of the hatch out of a sling load that was just starting down such small hatch nearly straight up and down, and secured by only a single cable sling. (R.T. 25, 26, 159-172 inclusive, 191-198 inclusive).

The evidence shows that such small hatch approximately 20 feet square, was not designed, intended or suitable for the safe loading and stowage of sling loads of 35 or 40 foot long pieces of 3 x 6 timbers because such long loads had to go down nearly end first, and a slider would be apt to fall out during such an operation and injure a longshoreman, as in the case at bar.

(R.T. 37, 38, 88-98 inclusive, 104, 173-180 inclusive, 194).

The evidence also shows that appellee knew or in the exercise of reasonable care should have known that such sling loads of lumber could have been safely loaded in two other larger hatches of such vessel where they could have been loaded flat or crossways, using two cable slings to one load, and a slider could not come out of such sling loads loaded in such a manner. (See the two following paragraphs).

Charles Edward Hodges, Superintendent of the Norpac Shipping Co., and agents for appellee, testified that he had charge of all the business of the ship involved in this case while the Dalerdyk was at Portland, Oregon, and during the time when appellant was injured. (R.T. 227, 228). Also that he was on board the Dalerdyk several times the day appellant was injured. (R.T. 248), **and that he or his supercargo (representing appellee) told the stevedoring company in what hatches to load certain cargo.** (R.T. 250.)

Mr. Hodges also testified on cross examination that if these sling loads of 3½ or 3 by 6 timbers of random lengths of up to 30 or 40 feet long to a sling load with about 18 pieces to a sling load had been loaded crossways or flat with two slings on a load down one of the larger hatches on the Dalerdyk, that you could not have a slider come out of such a sling load while load-

ing such cargo. (R.T. 240). This would certainly make it a much safer operation, and then appellant would not have been injured. Appellee failed to do this, and appellant was injured.

The evidence from the ship's loading record also shows that the same type of heavy rough decking that injured appellant was loaded into hatches 2 and 5, the two larger hatches of the Dalerdyk, (R.T. 239) where the slingloads did go down flat or crossways, on this same trip and loading operation. (Exhibit 6).

One witness, William H. Pitzer, testified as a witness for appellee that he was the operating manager of the States Steamship Company and had years of experience as a supercargo. Upon cross examination Mr. Pitzer testified that Rule 201 of the Pacific Coast Marine Safety Code (Exhibit 2) specifies that the owner and operator of all steamships shall provide a safe working place for all longshoremen engaged in loading or unloading cargo on such vessel. (R.T. 266, 267, 271). Opposing counsel agreed such safety code and rule applies to this case. (R.T. 210, 211).

The record further shows that appellant attempted through offers of proof by several of his witnesses to elicit additional evidence to the effect that if such heavy timbers or lumber cargo was loaded and stowed into either of these larger hatches on such vessel, that a slider could not fall out of such sling loads being so

loaded, and therefore the injuries to appellant would and could have been avoided. (R.T. 214, 215, 216).

Considering the cases cited in this argument, appellant also contends that the trial judge was in error in his interpretation of the law applicable to this case when in allowing a directed verdict, he said:

> "Now, throughout the trial the plaintiff's theory has been, particularly under its Specification G, that the defendant improperly used No. 3 hatch by causing and directing said large loads of long pieces to be loaded into and stowed in the hatch when it should have known by the exercise of reasonable care that the operation was extremely dangerous and liable to result in injury to longshoremen, including plaintiff, working in the hatch and when said vessel then had one or two other larger hatches which were available.
>
> **"Well, the Court has tried to be consistent since the initial ruling in that I am still of the opinion that a person cannot be negligent for not doing something. They are negligent for doing something. So, if the steamship company is to be held liable to the plaintiff in this case for negligence, it must be for something that they did."**
> (R.T. 304, 305).

Moreover, after the two-hour long noon recess, appellant suggested to the trial judge that because of the unusual hardship and serious injuries and substantial loss of wages to appellant, that the Court reconsider his ruling in allowing a directed verdict in favor of the

defendant, and let the case go to the jury. The trial judge said he thought that would just aggravate the matter, and then directed a verdict in favor of the defendant. (R.T. 309, 310, 311, 312).

Appellant contends that the same rule followed by the United States Supreme Court in Jones Act and Federal Employers' Liability Act cases, under its broad interpretation of common law standards as to negligence, also applies in the case at bar.

The relevant part of the FELA Statute, 45 U.S.C.A. section 53, provides that in personal injury cases:

> ". . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proporation to the amount of negligence attributable to such employee."

Rogers v. Missouri P. R. Co., 352 U.S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443 (1957) holds that the test of a jury case under FELA is whether the **proofs justify with reason the conclusion that the employer's negligence played even the slightest part in producing the injury or death for which damages are sought; when this test is met the judge must find that a jury case exists notwithstanding that, from the evidence, the jury may also, on grounds of probability, reasonably attribute the result to other causes, including the employees contributory negligence.**

In **Webb v. Illinois C. R. Co.,** 352 U.S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451 (1957) which was another case by a railroad brakeman under FELA, the court, at page 507, said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence."

"Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities."

The court then reversed the judgment of the court of appeals, which had reversed the trial court on the ground of the insufficiency of the evidence to support a jury finding of the employer's negligence.

In **Ferguson v. Moore-McCormick Lines, Inc.,** (1957), 352 U.S. 521, 1 L. Ed. 2d 511, 515, 77 S. Ct. 457, 459,

the court holds that **whether the act or failure** did in fact produce in part the injury to plaintiff, **the court must not** substitute its judgment as to foreseeability and causation for that of the jury. The court said, at page 514:

> "Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act, what we said in Rogers v. Missouri Pacific R. Co., 1 L. Ed. 2d 493, 515, decided this day, is relevant here.
>
> "Under this statute the test of a jury case is simply whether the proofs, justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

In a Jones Act case, **Sadler v. Pennsylvania R. Co.,** 159 F. 2d 784, at 786, there was evidence that the shipowner or the vessel had failed to provide a safe place to work, and there was proof of circumstances on which it could be reasonably inferred that the injury resulted from that failure.

From the opinion, at page 786, the court said:

> "Under the evidence here, it was for the jury to say **whether the failure of the defendant to have life saving apparatus available on the deck of the barge,** the place from which efforts to rescue men overboard would ordinarily be conducted, **did not constitute negligence to which the failure of the effort to rescue decedent was attributable.'"**

From a judgment for the defendant, the plaintiff

appealed. The case was reversed and remanded for a new trial.

Appellant contends, that considering the foregoing and other cases in this specification of error, that he is entitled to recover in the case at bar if the defendant's negligence played any part, even the slightest, in producing the injury. Appellant urges that much more than such a requirement is shown in the record in the instant case.

Appellant further urges that the evidence shows in the case at bar that this small twenty foot square hatch was improperly used to load these slingloads of long pieces of decking at the direction of the appellee's agent, because such hatch was not constructed or designed for such type of cargo, and a slider did fall out of a slingload going down such hatch, which resulted in appellant's injuries.

The fact that the record is silent as to whether such an accident ever happened before, and appellee's evidence that it was customary to load such cargo into this type of hatch, is immaterial, because the law is that customary practice cannot become proper care if such practice is itself negligent.

In the case at bar the appellee introduced evidence to show that it was customary to load such long pieces of decking in this same hatch on this vessel. (R.T. 232, 233, 234, 259, 260, 261, 265, 266).

Custom, under some circumstances, may establish the norm of care and caution, but a custom which in itself is negligent cannot ripen into proper and reasonable care and caution no matter how long it had been used. A negligent method of work, no matter how customarily employed, cannot excuse the appellee, who directed the cargo to be loaded into this small hatch, if in fact the method was negligent and likely to cause injury. This is a jury question. See **Texas & Pac. R. R. v. Behymer,** 189 U.S. 468; 23 S. Ct. 622; 47 L. Ed. 905 at **906:**

Then the case of **Elkton Auto Sales Corp. v. State of Maryland,** 53 F. 2d 8, 10 (5th Cir.) holds that negligence, if established, cannot be justified by custom.

Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, at 1296, 1297, holds that customary practice does not of itself negative negligence. The obligation is to do what should have been done—not what was usually done.

At pages 1297, 1298, the court says:

> "Ordinary care must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect . . . It must be commensurate with known dangers. **Defendant created the place in which the work was done and supervised the doing of the work by plaintiff** and was aware for a period of at least sixteen years of the conditions under which plaintiff was

required to work and of the means and methods by which its work was accomplished."

We have a similar situation in the case at bar because appellee created the place in which the work was done and in effect supervised the doing of the work by instructing the stevedoring company to put such cargo into that small hatch, and knew how the cargo was loaded end first down such hatch.

This court, in **The Indien,** 71 F. 2d 752, at page 759 (9th Cir. 1934) holds that mere custom, without more, under the law, is not conclusive, quoting Mr. Justice Holmes in **Texas & Pacific R. R. v. Behymer,** 189 U.S. 468, 470, supra:

> "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."
>
> " * * * Negligence, if established, cannot be justified by custom," citing Elkton Auto Sales Corporation v. Maryland (C.C.A. 4) 53 F. 2d 8, 10 (and citing many other cases)"

In **Smith v. Shevlin-Hixon Co.,** 157 F. 2d 51 (CA 9th 1946), which also was an appeal from a directed verdict, this court says, from the opinion, at pages 53 and 54:

> "It is hornbook law that, on a motion for a directed verdict, the evidence adduced by the opposing party shall be taken as true and all reasonable

inferences deducible therefrom shall be given their most favorable intendment. This rule is recognized in the jurisprudence of Oregon."

"In **Holland v. Hartwig,** 145 Or. 6, 10, 24 P. 2d 1023, 1024, the court said:

> "The question may be further simplified by bearing in mind that in determining whether the cause should have been submitted to the jury, direct evidence of any fact or facts should be construed as proof thereof. Where any fact, even though disputed, is disclosed by direct evidence, such fact may support an inference, because, with respect to disputed testimony in solving the question here involved, it is not for the appellate court to determine what the truth is. This court has but to ascertain whether there is direct testimony which the jury could have construed as proving the fact in question."

"Again, in **Christie v. Great Northern R. Co.,** 142 Or. 321, 328, 329, 20 P. 2d 377, 380, the point was further elaborated:

> "Upon motion for a directed verdict in favor of defendant, every reasonable inference that may be drawn from the testimony is to be resolved in favor of plaintiff * * *".

In the opinion, at page 57, this court says:

> "Nor can the appellee excuse itself by urging that it could not have foreseen that the appellant would suffer the particular mishap that overtook her. In McMillen v. Rogers, 175 Or. 453, 154 P. 2d 219,

222, decided in December, 1944, the Supreme Court of Oregon quoted with approval the following language:

'* * * In order to render a party liable for the consequences of his wrongful act, it is not necessary that he should have contemplated or been able to foresee the precise form or manner in which the plaintiff's injuries would be received.'

Aune v. Oregon Trunk Railway, 151 Or. 622, 632, 51 P. 2d 663, 667.

"Liability for negligence is not predicated upon the necessity that the wrongdoer should foresee that an injury would result from his wrongdoing. It is sufficient that in view of all the circumstances, he should have foreseen that his negligence would probably result in injury of some kind to someone." Horne v. Southern Railway Co., 186 S.C. 525, 197 S.E. 31 ,36, 116 A.L.R. 745.

"* * * It is not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye" Shearman and Redfield on Negligence, Revised Edition, Vol. One, pages 55 to 58, inclusive.

Continuing on page 57, this court says:

"The evaluation of 'all the circumstances' and the application of the criterion of what would be 'clear to the ordinarily prudent eye' are, under the Anglo-American system of law, peculiarly within the province of the jury. It is in the jury box rather than in an appellate court that the law prefers such practical and everyday tests to be made."

Continuing, at pages 59 and 60, this court says:

"Just as precise foresight of the particular injury is not necessary to render one liable for the consequences of his wrongful act—a doctrine approved in McMillen v. Rogers, supra, 175 Or. 453, 154 P. 2d 219—so is such precise foresight unnecessary 'in order to constitute a particular act of proximate cause of the injury.' Miami Quarry Co. v. Seaburg Packing Co., 103 Or. 362, 371, 204 P. 492, 495. It is sufficient if the wrongdoer could have reasonably anticipated that some injury might result.

"The learned judge below recognized that ' it is usually said that the question of causation is a jury question.' He failed to make it clear, however, why the instant case was an exception to the rule."

"The Supreme Court of Oregon has been emphatic in declaring that causation is a matter for the jury to determine. Ludwig v. Zidell, 167 Or. 488, 496-500, 118 P. 2d 1073, 1077 . . .'whether the installation of such protective guard or housing could have been made without impairing the efficiency of the machine is a question of fact. **Involved collaterally** in considering the question of practicability of proposed methods of guarding the machine is **the question whether the failure to have installed such or any covering or guard was the proximate cause of plaintiff's injury. That too is a question of fact."**

This court then reversed the lower court and remanded the case for a new trial.

In **Finn v. Spokane, Portland & Seattle Ry. Co.**, 241

P. 2d 876, 194 Or. 288, the Oregon Supreme Court holds that in determination of questions raised by motion for directed verdict, questions must be resolved upon consideration of all evidence and reasonable inferences derivable from evidence in light most favorable to plaintiff, **and in process of such determination, plaintiff is entitled to benefit, not only of his testimony, but also of any evidence favorable to him introduced by the defendant.**

In **O'Leary v. United States Line Company,** 215 F. 2d 708 at 715 (1 Cir. 1954) the court holds that:

> "In making a motion for a directed verdict the defendant admits the truth of all facts which the jury might find in favor of the plaintiff, whatever the nature of the evidence. He admits that if the evidence conflicts, that of the plaintiff is true so far as it conflicts with his own. The court also will make any inference of fact in favor of the party offering the evidence which the evidence warrants and which the jury, with the least degree of propriety, might have inferred . . . (citing cases)."

In **Meyers v. Pittsburgh Steamship Co.,** (6 Cir., 1948), 165 F. 2d 642, the question involved was whether the owner of a ship in drydock for repair is under any obligation to avoid the creation of a hazardous condition on the drydock by reason of water discharged from the ship onto the drydock in freezing weather, which resulted in injuries to plaintiff. The trial court directed a verdict in favor of the defendant. The case also dis-

cusses a customary practice as not controlling on the issue of negligence. The opinion, at page 644, reads:

> "The traditional and established test of negligence is, of course, the conduct of a reasonably prudent man in like circumstances, and it has long been settled that a finding of negligence is warranted even from an act not amounting to wanton wrong whether injury in some form ought to have been foreseen in the light of attendant circumstances." (citing many authorities).

From the opinion at page 644:

> "Applying these principles, a question of fact emerges from the record in this case which, upon applicable instructions, should have been submitted to the jury."

The directed verdict for the defendant was reversed upon appeal, and the case remanded for a new trial.

An Oregon case, **Jensen v. Salem Sand and Gravel Co.,** 192 Ore. 51, 233 P. 2d 237, (1951) involved an action for damages where plaintiff fell into a sewer ditch and was injured, which ditch had been excavated but partially refilled by defendant.

In discussing negligence, the court said:

> "Whether or not the given act may be negligence or not negligence depends upon the circumstances, for, as said in 1 Beven on Negligence, (3d ed.) at p. 9, 'it is not the act that connotes the negligence, but the circumstances.' As quoted by Mr. Justice Rand in Rice v. City of Portland, 141 Or. 205, 213,

7 P. 2d 989, 17 P. 2d 562, from Degg v. Milland Ry. Co., 1 H. & N. 781:

" 'There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person." See, also, Grand Trunk Ry Co., v. Ives, supra, where the court said: " 'The terms 'ordinary care, 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence.' " (at page 58).

Biddle v. Mazzocco, 204 Or. 547, at 554, 284 P. 2d 364, at 368 (June 2, 1955), was a recent case decided by the Oregon Supreme Court and involved an action for damages for personal injuries arising out of an automobile accident.

In the opinion, at 554, Justice Tooze defines negligence as follows:

"Negligence, in the absence of statute, is defined as the doing of that thing which a reasonably prudent person would not have done, **or the failure to do that thing which a reasonably prudent person would have done in like or similar circumstances; it is the failure to exercise that degree of care and prudence that a reasonably prudent person would have exercised in like or similar circumstances."**

Sullivan v. Shell Oil Company (9th Cir., 1956) 234 F. 2d 733 was an action for damages for personal in-

juries based on negligence. Jurisdiction of the District Court was based on diversity of citizenship, as in the case at bar.

At page 741, from the opinion, this court says:

"This court in a diversity case is required to determine California law on our precise question."

This court also followed Oregon law on negligence in **Smith v. Shevlin-Hixon Co.,** supra.

The foregoing propositions involved several of the charges of unseaworthiness and negligence against appellee (T. 3, 4, 5, 6, 7, 8, 19, 20, 21) and appellant contends that the evidence substantiated and proved one or more of such charges, so that it would be a question of fact for the jury to decide.

SPECIFICATION OF ERROR NUMBER TWO

The trial court erred as a matter of law in allowing and directing a verdict for said appellee, which was objected to by appellant, and having judgment entered thereon for appellee for the reason that the evidence affirmatively shows that the question of negligence in this case is a jury question.

ARGUMENT

As suggested in the argument under Specification of Error Number One in this brief, the same facts, evidence, law and argument apply to this Specification Two as to Specification One, so appellant will not repeat such argument and authorities here.

Appellant further contends that section 11, Rule 201 of the Pacific Coast Marine Safety Code (Exhibit 2) applies to the case at bar.
Such rule reads:

> "The owners and/or operators of vessels shall provide safe ship's gear and equipment and a safe working place for all stevedoring operations on board ship."

As suggested in Specification of Error One, appellant pointed out that appellee agreed such safety code and rule applies to this case. (R.T. 210, 211).

When Mr. Charles Edward Hodges, with many years experience as superintendent of the shipping company representing appellee, testified that he was present on board the M/S Dalerdyk several times that day appellant was injured (R.T. 248) and knew about how the loading operation was progressing, the appellee thereby had notice about the dangerous conditions existing that day, and also knew about such dangerous conditions before that day on that same trip, in connection with loading these long heavy decking 3 x 6 timbers down this small narrow hatch where appellant was injured.

Mr. Hodges knew, or should have known, before such decking cargo was lowered on end down such hatch, that a slider would be apt to fall out of a sling

load (R.T. 240) and he could have stopped such loading operation into such No. 3 hatch before appellant was hurt, and ordered such decking timber loaded into either or both of the two larger hatches on this ship (R.T. 250), hatches 2 and 5 (R.T. 239), where it could be loaded crossways so a slider could not fall out of any slingload (R.T. 240). The record shows that the same decking was loaded into the two larger hatches (Exhibit 6).

As charged in appellant's complaint (T. 7, 8, 19, 20) it was the duty of the appellee, through its agent, Mr. Hodges

(1) to provide appellant with a safe place to work;

(2) to see that all working conditions were safe;

(3) to see that said loading operation was carried on in a safe manner; and further,

(4) appellee failed to stop such work and operation in order to avoid an accident and injury to appellant.

Appellant contends that the evidence affirmatively shows appellee did violate and disregard its duty to appellant in one or more of the respects as charged in such charges of negligence, so that the matter was a jury question, and not a matter of law for the trial judge to decide.

The case of **United States v Luehr and Jones Steve-**

doring Company, 208 F. 2d 138 at 140 (9th Cir. 1953) suggests that a violation of such a safety code would not constitute negligence per se, and **it would be a question of fact whether conduct under given circumstances constituted negligence.**

The case of **Feinman v. A. H. Bull S. S. Co.,** 216 F. 2d 393, at 396 (October, 1954) holds that the owner of the ship must furnish a safe place to work for a longshoreman, and that the owner must furnish a place that is reasonably safe for the duty to be performed by the longshoreman, and the fact that the longshoreman's employer has a concurrent duty to the same effect does not excuse the shipowner from also meeting his obligation to furnish the longshoreman a safe place to work. The longshoreman in the Feinman case was struck by a falling hatch beam while working on board ship.

In **U. S. v. Arrow Stevedoring Co.,** 175 F. 2d 329 (9th Cir. 1949) a stevedore was injured working on board ship resulting from an unsafe method of doing the work. The stevedore company was employed by the government to unload naval cargo on the U.S.S. Edgecomb and the stevedore was employed by such company.

In the opinion Judge Denman refers to the proposition that the government is liable to the stevedore because it had a continuing duty to him to see that at all times he had a safe place to work, and is liable to

him for a failure to keep the vessel seaworthy in that regard. "Such liability exists even though the sole proximate cause of such unseaworthiness and the injury to Williams was not the defect in the hatch cover, but, as the government claims, its conscious use with knowledge of its defect, by the stevedore's superintendent in a way making it dangerous and causing the injury to Williams." 175 F. 2d 329, 330.

Judge Denman, at page 330, then says:

> "It is not questioned that though the unseaworthiness condition arising from negligent use of the hatch cover was not caused by the government's fault, it is nevertheless liable. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90, 66 S. Ct. 872, 90 L. Ed. 1099."

In the case of **Pope & Talbot, Inc. v. Hawn,** 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, negligence and unseaworthiness were alleged to be the cause of the plaintiff's injuries, among other things, the court held that the shipowner owes a carpenter, who was a business invitee, the duty of providing him with a reasonably safe place to work. (See **Hawn v. Pope & Talbot, Inc.** 198 F. 2d 800, at 803).

The same duty was present during all times the appellee longshoreman was on board the M/S DALERDYKE, and appellee owed Mr. Phipps the duty of providing him with a reasonably safe place to work.

It is a jury question if appellee violated such duty.

SPECIFICATION OF ERROR NUMBER THREE

The trial court erred as a matter of law in allowing and directing such verdict for appellee in that the evidence shows that appellee, by telling the stevedore company by whom appellant was employed where to put and stow such decking cargo, thereby improperly directed appellant to work in an unsafe and dangerous place, which charge of negligence would be a jury question.

ARGUMENT

As before suggested, the witness Hodges, or his supercargo, told the stevedoring company the appellee employed in what hatches of the Dalerdyk to load all cargo before and at the time appellant was injured (R.T. 250).

It then would follow that thereby appellee by so doing improperly directed appellant to work in an unsafe and dangerous place as a member of a gang of longshoremen, who were all business visitors, engaged to load such decking cargo in No. 3 hatch.

The argument and authorities cited in Specification of Errors One and Two of this brief apply to this assignment and will not be repeated now.

SPECIFICATION OF ERROR NUMBER FOUR

The trial court erred as a matter of law in allowing and directing such verdict for appellee in that the evi-

dence shows that it was a jury question whether said vessel was unseaworthy by reason of the way such No. 3 hatch was constructed and used for such lumber loading operation, in that such hatch was too small and too dangerous and unsafe for loading and stowing such large slingloads of long random length heavy pieces of timber end first down said small hatch.

ARGUMENT

Appellant again believes and urges this court that the same facts, authorities cited, and argument contained in Specification of Errors One and Two of this brief also apply to this Specification of Error Number Four, without the necessity of repeating them here.

SPECIFICATION OF ERROR NUMBER FIVE

The trial court erred as a matter of law in allowing and directing such verdict for appellee in that the evidence shows that it was a jury question whether appellee improperly used said small No. 3 hatch by causing and directing said large loads of long pieces of decking to be loaded into said hatch end first, when appellee knew or should have known by the exercise of reasonable care that such operation was extremely dangerous and liable to result in injuries to longshoremen, including appellant, working in such hatch, and when such vessel then had two other larger hatches which were available, and which could have been used

to load and stow such decking by lowering it crossways, and thereby make it a reasonably safe operation and avoid injuring appellant.

ARGUMENT

To save repetition, appellant again suggests to this court that the same facts, authorities cited, and argument contained in Specification of Errors One and Two of this brief apply to this Specification of Error Number Five, without repeating same at this time.

SPECIFICATION OF ERROR NUMBER SIX

The trial court erred in refusing to admit in evidence a picture of one of the large hatches on the M/S Dalerdyk, appellant's Exhibit 4-a; and the trial court also erred in refusing to admit in evidence testimony of several of appellant's witnesses regarding the proposition that if these large slingloads of random length decking lumber were loaded flat or crossways into such large hatch, with two slings, then a slider could not come out of such slingloads, and thereby it would be a much safer operation and appellant would not have been injured; offers of proof were made by appellant regarding such evidence, and not allowed by the trial judge; considering that one of appellee's expert witnesses, Superintendent Charles E. Hodges, did testify on cross examination that a slider could not come out of a slingload if loaded flat.

ARGUMENT

This specification of error actually involves one general proposition, so it will be presented in that manner to shorten this brief.

The picture of the hatch referred to, appellant's Exhibit 4-A (R.T. 15, 20), and the refusal of the trial judge to admit in evidence the additional testimony of the witnesses Tovey, Roberts, Goertzen and appellant, as to what difference could there have been in this operation of loading these particular dimensioned timbers so that it would have prevented or avoided this accident happening (R.T. 105, 106, 120, 121, 171, 172, 178, 179, 206, 207, 214, 215, 216), and the offer of proof to the effect that such timbers or decking could have been loaded into one or two larger hatches of the ship flat or crossways with two slings on a slingload, so that sliders could not have come out of such slingloads while being lowered down in the hold or hatch (R.T. 214, 215, 216), all goes to prove and substantiate appellant's charge of negligence upon this proposition (T. 4, 20, 21), and raises questions of fact for the jury.

The authorities cited and discussed in Specification of Error Number One in this brief, **regarding negligence,** also apply to this specification of error, so they will not be repeated here.

Arthur v. Parish, 47 P. 2d 682, 150 Or. 582, was a

case involving a jury trial in an action on a promissory note. The execution and delivery of the note was admitted, but the amount due was denied. The defendant alleged partial payment in his Answer, which was denied in the Reply. The trial judge excluded testimony as to what the deceased owner of the note said to a witness about the defendant's answer to an inquiry over the telephone concerning payment of the note sued on.

In the opinion, at pages 590, 591, the court says:

> "In view of evidence of declarations against the interest of the deceased, we think the witness should have been permitted to testify to what the decedent said about the defendant's answer to the inquiry concerning payment of the note * * *. Payment of the note was a vital issue in the case and it may be that the jury would have reached a different conclusion had the declaration of decedent in his favor been admitted in evidence. **No offer of proof is necessary as the matter arose on cross-examination.**
>
> "In our opinion, the trial court also erred in excluding certain memoranda, marked for identification as plaintiff's exhibits 7 and 8, made by the deceased in his own handwriting, pertaining to the notes involved in this litigation. These exhibits were in the nature of declarations in favor of the decedent. * * * It follows that the order of the lower court setting aside the judgment and granting a new trial is affirmed."

Then in regard to the proposition of the error of the

trial judge in sustaining objections to questions asked of witnesses on direct examination by counsel for appellant, the Oregon case of **Boord v. Kaylor,** 114 Or. 62, 234 Pac. 263 is applicable.

In the opinion, at page 65, the court says:

> "Assignments of error numbered five, six, eight, nine and eleven pertain to rulings of the court in sustaining objections to questions asked of witnesses on direct examination by counsel for the defendant. In view of the fact that the record does not disclose the information expected to be elicited by the answers, we cannot say that the interests of the defendant were materially affected. Counsel should have made a showing of what was expected to be proved by the answers to these questions, and the same should have been incorporated in the bill of exceptions."

Boord v. Kaylor, 114 Or. 62, 234 Pac. 263, supra, is followed with approval in **Burgess v. Charles A. Wing Agency,** 139 Or. 614, at 624, 11 P. 2d 811, where the court holds that an offer of proof must follow ruling excluding evidence on direct examination before ground for reversal will be present.

In the case at bar, it will be seen that appellant complied with the law on this subject as determined by the Oregon Supreme Court.

SPECIFICATION OF ERROR NUMBER SEVEN

That the trial court erred in restricting cross examination and refusing to allow appellee's witness Charles

E. Hodges to answer the following question upon cross-examination:

> "Q. I mean, this rough lumber, that 3½ or 3 by 6 stuff with random lengths up to 30, 40 feet long in one slingload and you had about 18 pieces to a slingload. You couldn't have a slider if you loaded it flat, could you?
>
> "A. Not very well, no.
>
> "Q. Yes, that would be a lot safer operation than if you get that same deal end-first down the Booby Hatch, wouldn't it?
>
> "The Court: Don't answer.
>
> "Mr. Brooke: I object to that.
>
> "The Court: The objection will be sustained. The question is not what would have been a better way; the question is whether or not they were negligent in loading the hatch in the way it was loaded." (T. 240, 241).

ARGUMENT

Appellant again contends that in regard to the foregoing proposition it is obvious what the witness would have answered to the question objected to, because in response to another question quoted, he had just answered that you couldn't have a slider fall out of a slingload of decking if you loaded it flat.

In addition to the facts, cases and argument under Specification of Error Number One in this brief applying to this Specification of Error Seven, the Oregon

case of **Arthur v. Parish,** 47 P. 2d 682, 150 Or. 582, at 590, 591, supra, is applicable, which is discussed in Specification of Error Number Six in this brief, which holds that no offer of proof is necessary, as the matter arose on cross examination.

SPECIFICATION OF ERROR NUMBER EIGHT

That the trial court erred in restricting cross examination and refusing to allow appellee's witness Herman Larsen to answer the following question upon cross examination:

> "Q. Captain Larsen, assuming that you have a slingload of this 3 x 6 dimension rough decking, lumber, at random lengths about 2 feet square, and the lengths are up to, approximately, 35 feet —a little more or less—some of the sticks, and you take a load like that—a slingload, and you put two slings on it about 8 feet apart. That would be approximately 4 feet off-center for each sling, you know, this way (attorney demonstrates). You understand what I mean, don't you?
>
> "A. Yeah; I understand.
>
> "Q. Then, the winch drivers would take that particular slingload over from the dock, over the deck, and then they'd take this and put it down flat or crossways into this hatch which was 36 feet long, we will say, on that particular ship. Now if they did it in that method, you could not possibly have a slider come out, could you?
>
> "Mr. Brooke: If your Honor please, I object to that as having no pertinency to the case.

"The Court: Yes. The Court has ruled on that on several occasions. Your objection will be sustained.

"Mr. Conway: Well, the witness yesterday testified about that, your Honor, on cross examination. Mr. Hodges———

"The Court: I understand.

"Mr. Brooke: I wasn't quick enough on my feet. I guess.

"The Court: There wasn't any objection made.

"Mr. Conway: That's all. Thank you.

"Mr. Brooke: That's all.

"The Court: That is all, sir. You may step down." (T. 262, 263).

ARGUMENT

In addition to the facts, cases and argument under Specifications of Error Numbers One and Seven in this Brief applying to this Specification of Error Number Eight, appellant further suggests that it is a physical fact that a slider cannot come out of a slingload if it is loaded crossways or flat down a hatch on a loading operation of the kind involved in the case at bar. That makes a safe operation as far as sliders are concerned.

SPECIFICATION OF ERROR NUMBER NINE

That the trial court erred as a matter of law when he failed, after being requested by the clerk, to sign a pre-trial order in this case, which was agreed to by all counsel in writing, and lodged and filed with the

Clerk of the United States District Court as of March 25, 1957, and which fact was not ascertained for the first time by counsel until on or about January 15, 1958, as such pre-trial order was used by the trial judge at the trial of this case as if it had been executed by such trial judge.

ARGUMENT

Appellant would like to be enlightened as to the above matter of practice in this Circuit, or in the District of Oregon, as the problem arose when opposing counsel and the writer were checking over the record and exhibits on or about January 15, 1958, in the office of the Clerk of the District Court at Portland, Oregon.

One of the deputy clerks then presented such pre-trial order to the trial judge for his signature, after we found out he had not signed it, but he didn't sign it, and neither opposing counsel or the writer know why the trial judge didn't sign such pre-trial order.

The trial judge used and referred to such pre-trial order during the trial from time to time, as shown in the transcript of proceedings (R.T. 17, 156, 210, 211, 212, 213, 215, 229, 271, 272, 273, 274, 286, 287, 304, 305, 307, 308).

CONCLUSION

In conclusion, it is submitted that the trial court erred with respect to each specification of error presented in this brief, and that this case should be reversed and remanded for a new trial in all respects, with costs to appellant in both courts.

Respectfully submitted,

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APPENDIX

Exhibits in Case

Plaintiff's	Identified	Offered and Received	Rejected
2	Pacific Coast Marine Safety Code T-211	T-211-212	
3-A	X-ray film, T-132	T-132	
4	Photograph, T-14	T-212	
*4-A	Photograph, T-14	T-212	T-20, 100
4-B, C	Two Photographs, T-74	T-83	
4-D, E, F, G, H. I, J	Seven 35-mm Kodacrome slides, T-49, 136	T-152	
5	St. Vincent's Hospital Records on Mr. Phipps, T-44	T-44	
6-A, B, C	Income tax returns for 1952, 1953 as amended and 1954 for Kenneth J. Phipps and Edith R. Phipps, respectively, T-157	T-189	
Defendant's			
6	Booklet designated as Vessel's Loading Record, T-252	T-256	

The transcript and pages above referred to refer to the reporter's transcript of proceedings in this case.